

E-Filed 2/24/06

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants.

Case Number C 04-4736 JF

ORDER¹ RE PLAINTIFFS' SECOND
CLAIM

I. BACKGROUND

Plaintiffs Center for Biological Diversity and California Native Plant Society filed the above-entitled action on November 9, 2004, alleging two claims for relief against Bureau of Land Management ("BLM") and Mike Pool, State Director of the BLM for California. As framed originally, these claims were (1) that Defendants are violating the Endangered Species Act ("ESA") by failing to reinitiate consultation, and (2) that Defendants are violating the ESA because their management of the Clear Creek Management Area ("CCMA") jeopardizes the San Benito evening-primrose ("evening-primrose"). On March 28, 2005, Plaintiffs filed a motion for

¹ This disposition is not designated for publication and may not be cited.

1 summary judgment. On April 29, 2005, Defendants filed a cross-motion for summary judgment.
2 On July 15, 2005, the Court issued an order stating that it would defer ruling on the motions for
3 summary judgment until after the Fish and Wildlife Service ("FWS") issued an anticipated
4 Biological Opinion evaluating the effect of BLM's management of CCMA on the evening-
5 primrose. On September 2, 2005, FWS issued the anticipated 2005 Biological Opinion ("2005
6 BO"). Plaintiffs and Defendants subsequently filed supplemental briefs discussing the impact of
7 the 2005 BO on the pending motions for summary judgment. On September 16, 2005, Plaintiffs
8 filed a motion for leave to file a supplemental complaint raising certain objections to the 2005
9 BO. On October 4, 2005, the Court issued an order dismissing Plaintiffs' first claim as moot,
10 deferring determination of Plaintiffs' second claim, and granting Plaintiffs' motion for leave to
11 file a supplemental complaint. Plaintiffs' additional claim, asserted against FWS, alleges that the
12 2005 BO is arbitrary, capricious, and unlawful. Neither party has yet filed any motion with
13 respect to Plaintiffs' additional claim, and Defendants noted in their opposition to the instant
14 motion that FWS is presently in the process of compiling the administrative record for the 2005
15 BO.

16 On January 9, 2006, this Court issued an order deferring ruling on Plaintiffs' motion to
17 enforce its order of October 28, 2005 and setting a schedule for supplemental briefing. In
18 accordance with that order, the parties have submitted briefing with respect to the impact of the
19 issuance of the Record of Decision ("ROD") based on the 2005 BO, which Defendants had
20 represented would occur by January 13, 2006, has on Plaintiffs' second claim. The Court heard
21 oral argument on this issue on February 24, 2006.

22 II. DISCUSSION

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24 The issue presently before the Court is whether Plaintiffs' second claim is moot. The
25 parties interpret differently the breadth of the second claim, which is labeled "Violation of the
26 Endangered Species Act: Current Management of the CCMA Jeopardizes the San Benito
27 Evening Primrose." Defendants contend that the second claim is based exclusively on the
28 contention that Defendants have failed to implement fundamental requirements set out in the

1 1997 BO, while Plaintiffs argue that the second claim argues more generally that “current
2 management of the CCMA jeopardizes the Evening Primrose” under Section 7(a)(2) of the ESA.
3 The second claim reads as follows:

4 The FWS predicated its “no jeopardy” finding on BLM’s proposed
5 protective measures. However, BLM has failed to implement those measures,
6 placing the San Benito Evening-primrose in jeopardy. By failing to halt route
7 proliferation, expanded use of the barrens, and allowing ORV use to continue and
8 increase despite over 15 recorded incidents of damage to CABA and its habitat,
9 BLM has failed to ensure that its management of the CCMA is not likely to
10 jeopardize the continued existence of CABA, as required by Section 7(a)(2) of the
11 ESA.

12 The San Benito Evening-primrose is an annual plant whose population
13 numbers fluctuate widely in both space and time depending on climatic
14 conditions. It is thus dependent on the maintenance and protection of sufficient
15 amounts of both occupied and unoccupied suitable habitat in order to
16 accommodate annual shifts in reproduction, numbers and locations. The
17 serpentine soils and streamside terraces where CABA occurs are extremely fragile
18 and easily damaged by ORV use and by deposition of sediment from eroding
19 slopes and barrens. This damage is extremely difficult, if not impossible, to
20 reverse once it has occurred. As unregulated ORV use and damage to CABA
21 habitat continues, the number of suitable acres is decreasing in both occupied and
22 unoccupied sites. As suitable habitat is destroyed, areas where the species can
23 reproduce and maintain itself in years of appropriate climatic conditions are
24 reduced. If this habitat destruction continues unchecked, this species will be
25 placed at jeopardy of extinction.

26 Complaint, pp. 18-19. The second request for relief asks that the Court “[o]rder, declare and
27 adjudge that Defendants are in violation of the ESA, 16 U.S.C 18 § 1536(a)(2), by jeopardizing
28 the San Benito Evening-primrose through its failure to implement 19 required mitigation
measures which formed integral components of the 1997 BO’s finding of no-jeopardy.”
Complaint, p. 19.

 Given liberal pleading standards, the Court could, in its discretion, interpret Plaintiffs’
second claim as Plaintiffs do—as a claim alleging that BLM’s management of the CCMA is not
in compliance with the Section 7(a)(2) of the ESA. However, Defendants’ position that
Plaintiffs’ second claim is predicated on the argument that Defendants are not in compliance with
the 1997 BO is not without substantial justification. The Court is concerned that it might cause
confusion, and possible jurisdictional challenges, if it were to give broad and general meaning to
Plaintiffs’ second claim.

 Because of the ongoing implementation of the 2006 ROD, the anticipated timeline for the

1 compilation of the administrative record for the 2005 BO, and Plaintiffs' preference for deferring
2 further litigation until the end of the 2005-2006 use season, there is sufficient time to allow
3 Plaintiffs to clarify the second claim. Accordingly, the claim will not be dismissed. Instead, in
4 its discretion, the Court will abate proceedings as to the second claim as it is presently framed.
5 Plaintiffs shall satisfy the sixty-day notice requirement of the ESA, 16 U.S.C. § 1540(g)(2)(A)(I),
6 with respect to their second claim as it was described in their most recent moving papers and at
7 the February 24, 2006 hearing. After the sixty-day notice period has been satisfied, Plaintiffs
8 shall file an amended complaint that clarifies the nature of their second claim. The Court does
9 not conclude that the sixty-day notice and amended complaint necessarily are required, nor will
10 providing such notice and filing an amended complaint be deemed a concession by Plaintiffs as
11 to this point.

12 Plaintiffs ask that the Court delay ruling on their second claim and require that BLM
13 "provide the Court with an updated status report at the end of this 2005-2006 OHV use season to
14 summarize how it has implemented the 2006 ROD and how future implementation shall occur."
15 The Court concludes that such a report would be useful with respect to both Plaintiffs' second
16 and third claims. At the February 24, 2006 hearing, Defendants represented that the 2005-2006
17 OHV use season will end on June 1, 2006 and that it would be possible for them to submit a
18 report by the end of June, 2006. Accordingly, by June 30, 2006, Defendants shall submit a report
19 summarizing how BLM has implemented the 2006 ROD during the 2005-2006 use season and,
20 to the extent that such information is available at the time, how future implementation will occur.
21 This report may take the form of either a status report or a supplemental legal brief.

22 The Court will hear oral argument on the pending motions for summary judgment with
23 respect to Plaintiffs' second claim (as it may be subsequently amended), and on any motions
24 related to Plaintiffs' third claim, at 9:00 am on August 25, 2006. Supplemental briefing on the
25 pending motions for summary judgment, in response to Plaintiffs' amendment of their second
26 claim and the information provided by BLM's report regarding the 2005-2006 use season, shall
27 be submitted in accordance with the local rules.

28 IT IS SO ORDERED.

1 DATED: February 24, 2006

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JEREMY FOGEL
United States District Judge

1 This Order has been served upon the following persons:

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